

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case Nos. 2006-0912 and 2007-0140, 1808 Corporation v. Town of New Ipswich & a., the court on March 12, 2008, issued the following order:

The petitioner, 1808 Corporation, appeals two superior court orders. In the first order, the superior court granted the cross-motion for summary judgment filed by the respondent, Town of New Ipswich (Town), and ruled that the Town's planning board had lawfully and reasonably partially revoked the petitioner's site plan approval. In the second order, the superior court granted the Town's motion to enforce the Town's cease and desist order, thereby ordering the petitioner to remove its new sign and assessing civil penalties against the petitioner. We reverse and remand.

We first address the trial court's grant of summary judgment to the Town. When reviewing a trial court's grant of summary judgment, we consider the affidavits and other evidence, and all inferences properly drawn from them, in the light most favorable to the non-moving party. Lacasse v. Spaulding Youth Ctr., 154 N.H. 246, 248 (2006). If our review of the evidence does not reveal a genuine issue of material fact, and if the moving party is entitled to judgment as a matter of law, we will affirm the trial court's decision. *Id.* We review the trial court's application of the law to the facts *de novo*. *Id.*

When reviewing the planning board's decision to partially revoke the petitioner's site plan approval, the trial court was obligated to treat the factual findings of the planning board as *prima facie* lawful and reasonable and could not set aside its decision absent unreasonableness or an identified error of law. Summa Humma Enters. v. Town of Tilton, 151 N.H. 75, 79 (2004). The petitioner had the burden of persuading the superior court that, by the balance of probabilities, the board's decision was unreasonable. *Id.*

RSA 676:4-a, I(b) (1997) permits a planning board to revoke site plan approval "[w]hen the applicant . . . has performed work, erected a structure or structures, or established a use of land, which fails to conform to the statements, plans or specifications upon which the approval was based, or has materially violated any requirement or condition of such approval." "Planning boards must judiciously use their revocation power under RSA 676:4-a." Brewster v. Town of Amherst, 144 N.H. 364, 373 (1999).

The planning board here revoked the petitioner's site plan approval because: (1) the petitioner failed to provide specifications for its proposed sign, as required by the Town's site plan regulations, and therefore, never received approval for a specific sign on its property; (2) the sign was erected in a different location from that shown on the approved plan; and (3) the sign erected fails to conform to statements the petitioner made in its application for a special exception.

We first address whether the record supports the planning board's finding that the petitioner failed to provide specifications for its proposed sign and, thus, never received approval for a specific sign on its property. While the record supports the planning board's finding that the petitioner did not provide specifications for its proposed sign, it also shows that the planning board approved the site plan even without these specifications. The record shows as well that although the planning board initially approved the plan conditionally, none of the conditions it imposed concerned the proposed sign. Had the planning board viewed the petitioner's plan as deficient with respect to the detail submitted about the proposed sign, it could well have conditioned its approval upon the submission of additional detail. Failing that, the planning board cannot now fault the petitioner for failing to submit detail that was never requested.

We next address the location of the sign. Two planning board members stated that based upon their measurements of the current sign, it is "located approximately 35 feet from where it is shown on the plan." The certified record establishes, however, that the symbol used to show the sign on the site plan was not drawn to scale and "was not intended to depict the size of the sign." The planning board impliedly found this was the case when it partially revoked the petitioner's site plan approval, in part, because the site plan failed to show the "size, height, orientation and elevation view" of the sign. Given that the symbol was not drawn to scale and was merely intended to signify a proposed sign in an approximate location, we conclude that the record does not support the planning board's finding that the current sign's location fails to comport with the site plan. The proposed sign's approximate location could not have been a specification upon which approval of the site plan was based.

We next address whether the planning board reasonably could rely upon statements the petitioner made in its application for a special exception to revoke the petitioner's site plan approval. The petitioner's statements on its application for a special exception were not, as a matter of law, statements upon which the planning board's conditional or final approval were based. Temporally speaking, the conditional approval preceded these statements. The planning board's final approval was not based upon any statements the petitioner made in its application for a special exception, but was based upon the fact that the zoning board approved the application.

For all of the above reasons, therefore, we conclude that the planning board erred as a matter of law when it partially revoked the petitioner's site plan approval. The trial court's decision to the contrary is reversed. In light of our decision, the trial court's grant of the Town's motion to cease and desist and imposition of civil penalties against the petitioner are also reversed.

Reversed and remanded.

DALIANIS, DUGGAN and GALWAY, JJ., concurred.

**Eileen Fox,
Clerk**